

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD C. PRICE,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the
National Labor Relations Board

BRIEF
For Richard C. Price

FILED

MAY 23 1966

JOHN R. CARROLL

WM. B. LUCK, CLERK 501 Washington Street
Santa Clara, California 95050
FEB 14 1967 Attorney for Richard C. Price



I N D E X

	Page
Jurisdiction	1
Statement of the Case	2
I. The Stipulated Facts	2
II. The Board's Decision and Order	5
Specification of Errors	6
Argument	8
I. The Board Erred in Failing to Find that Section 8(b)(1)(A) of the Act Prohibits Local 4028 from Punishing a Member in Reprisal for the Filing of a Decertification or Deauthorization Petition	8
A. Section 8(b)(1)(A) Reaches Union Conduct that Impedes or Delays Union Members from Resort to the Board	9
1. Controlling authorities and considerations support the doctrines embodied in the Skura and Roberts cases	12
2. The Act gives employees the right to petition for union decertification and deauthorization	17
3. The Board's decision is incompatible with the Skura and Roberts cases, and reaches an incongruous result	20
B. The Board Erred in Finding that the Fine Imposed on Price Had No Operative Effect..	24
II. Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 Does Not Privilege the Punishing of Price by Local 4028 ..	26
Conclusion	32
Appendix	33

	Page
<i>Local</i> 542, <i>International Union of Operating Engineers, AFL-CIO v. N.L.R.B.</i> , 328 F.2d 850 (C.A. 3), cert. denied, 379 U.S. 826	25-26
<i>Local</i> 636 <i>United Ass'n. v. N.L.R.B.</i> , 287 F.2d 354, (C.A.D.C.)	16
<i>Local</i> No. 1150, <i>United Electrical, Radio and Machine Workers, etc.</i> , 84 NLRB 972	26
<i>Meyer & Welch, Incorporated</i> , 96 NLRB 236	23
<i>Millwrights & Machinery Erectors, Local Union</i> 1510, 152 NLRB No. 132, 59 LRRM 1310	11
<i>Morse & Morse, Inc.</i> , 83 NLRB 383	19
<i>N.L.R.B. v. Cleveland-Cliffs Iron Co.</i> , 133 F.2d 295 (C.A. 6)	25
<i>N.L.R.B. v. Downtown Bakery Corp.</i> , 330 F.2d 921 (C.A. 6)	23
<i>N.L.R.B. v. Drivers Local Union No. 639</i> , 362 U.S. 274	17-18
<i>N.L.R.B. v. Ford, et al.</i> , 170 F.2d 735 (C.A. 6)	26
<i>N.L.R.B. v. Monsanto Chemical Company</i> , 205 F.2d 763 (C.A. 8)	17
<i>N.L.R.B. v. Southern Bleachery & Print Works</i> , 257 F.2d 235 (C.A. 4), cert. denied, 359 U.S. 911	15
<i>Pacemaker Corporation v. N.L.R.B.</i> , 260 F.2d 880 (C.A. 7)	15
<i>Pacific Intermountain Express</i> , 110 NLRB 96, enfd., 228 F.2d 170 (C.A. 8), cert. denied, 351 U.S. 952	13
<i>Pederson v. N.L.R.B.</i> , 234 F.2d 417 (C.A. 2)	15
<i>Petroleum Carrier Corp. of Tampa, Inc.</i> , 126 NLRB 1031	13
<i>Precision Fittings, Inc.</i> , 141 NLRB 1034	15
<i>Progressive Mine Workers v. N.L.R.B.</i> , 187 F.2d 298 (C.A. 7)	26
<i>Ready Mixed Concrete Company</i> , 117 NLRB 1266	26
<i>Retail Clerks International Association v. Montgomery Ward & Co.</i> , 316 F.2d 754 (C.A. 7)	19
<i>Roberts v. N.L.R.B.</i> , 350 F.2d 427, 11, 12, 21, 25, 28, 29	
<i>Salzhandler v. Caputo, et al.</i> , 316 F.2d 445	16

	Page
<i>Sanco Piece Dye Works</i> , 38 NLRB 690	14
<i>Sewell Manufacturing Co.</i> , 172 F.2d 459 (C.A. 5)	25
<i>Sheridan v. United Brotherhood of Carpenters, etc.</i> , Local 626, 191 F.Supp. 347 (D.C. Del.)	30
<i>Shipwrecking, Inc.</i> , 136 NLRB 1518	14
<i>Spayd v. Ringling Rock Lodge</i> , 270 Pa. 67, 113 Atl. 70	16
<i>St. Louis Independent Packing Co. v. N.L.R.B.</i> , 291 F.2d 700 (C.A. 7)	23
<i>Superior Company, Inc.</i> , 94 NLRB 586, <i>enf't denied on evidentiary grounds</i> , 199 F.2d 39 (C.A. 6)	14
<i>Tawas Tube Products, Inc.</i> , 151 NLRB No. 9, 58 LRRM 1330	5, 20
<i>Texas Industries, Inc.</i> , 139 NLRB 365, <i>enf'd</i> , 336 F.2d 128 (C.A. 5)	14
<i>Textile Workers Union (Personal Products Co.)</i> , 108 NLRB 743, <i>enf'd in relevant part</i> , 227 F.2d 409 (C.A.D.C.)	14
<i>The American White Cross Laboratories, Inc.</i> , 66 NLRB 866	24
<i>The Mennen Company</i> , 108 NLRB 348	20
<i>Tri-County Employers Ass'n.</i> , 103 NLRB 653	13
<i>Universal Packaging Corporation</i> , 149 NLRB 262	15
<i>Wakefield's Deep Sea Trawlers, Inc.</i> , 115 NLRB 1024	20
<i>Wellman-Lord Engineering, Inc.</i> , 148 NLRB 674	11
<i>West Texas Utilities Co.</i> , 22 NLRB 522	13
<i>Winn Dixie Stores, Inc.</i> , 128 NLRB 574	14
<i>Wood, Wire & Metal, etc., Local 238</i> , 156 NLRB No. 93, 61 LRRM 1172	11
 Statutes:	
<i>National Labor Relations Act, as amended</i> (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>):	
Section 7	6, 8, 11, 13, 17, 22
Section 8(a) (1)	9, 12, 13
Section 8(a) (2)	23, 24

	Page
<i>Local</i> 542, <i>International Union of Operating Engineers</i> , AFL-CIO v. N.L.R.B., 328 F.2d 850 (C.A. 3), cert. denied, 379 U.S. 826	25-26
<i>Local</i> 636 <i>United Ass'n. v. N.L.R.B.</i> , 287 F.2d 354, (C.A.D.C.)	16
<i>Local</i> No. 1150, <i>United Electrical, Radio and Machine Workers, etc.</i> , 84 NLRB 972	16
<i>Meyer & Welch, Incorporated</i> , 96 NLRB 236	23
<i>Millwrights & Machinery Erectors, Local Union</i> 1510, 152 NLRB No. 132, 59 LRRM 1310	11
<i>Morse & Morse, Inc.</i> , 83 NLRB 383	19
<i>N.L.R.B. v. Cleveland-Cliffs Iron Co.</i> , 133 F.2d 295 (C.A. 6)	25
<i>N.L.R.B. v. Downtown Bakery Corp.</i> , 330 F.2d 921 (C.A. 6)	23
<i>N.L.R.B. v. Drivers Local Union No. 639</i> , 362 U.S. 274	17-18
<i>N.L.R.B. v. Ford, et al.</i> , 170 F.2d 735 (C.A. 6)	26
<i>N.L.R.B. v. Monsanto Chemical Company</i> , 205 F.2d 763 (C.A. 8)	17
<i>N.L.R.B. v. Southern Bleachery & Print Works</i> , 257 F.2d 235 (C.A. 4), cert. denied, 359 U.S. 911	15
<i>Pacemaker Corporation v. N.L.R.B.</i> , 260 F.2d 880 (C.A. 7)	15
<i>Pacific Intermountain Express</i> , 110 NLRB 96, enfd, 228 F.2d 170 (C.A. 8), cert. denied, 351 U.S. 952	13
<i>Pederson v. N.L.R.B.</i> , 234 F.2d 417 (C.A. 2)	15
<i>Petroleum Carrier Corp. of Tampa, Inc.</i> , 126 NLRB 1031	13
<i>Precision Fittings, Inc.</i> , 141 NLRB 1034	15
<i>Progressive Mine Workers v. N.L.R.B.</i> , 187 F.2d 298 (C.A. 7)	26
<i>Ready Mixed Concrete Company</i> , 117 NLRB 1266	26
<i>Retail Clerks International Association v. Montgomery Ward & Co.</i> , 316 F.2d 754 (C.A. 7)	19
<i>Roberts v. N.L.R.B.</i> , 350 F.2d 427	11, 12, 21, 25, 28,
<i>Salzhandler v. Caputo, et al.</i> , 316 F.2d 445	29
	16

	Page
<i>Sanco Piece Dye Works</i> , 38 NLRB 690	14
<i>Sewell Manufacturing Co.</i> , 172 F.2d 459 (C.A. 5)..	25
<i>Sheridan v. United Brotherhood of Carpenters, etc., Local 626</i> , 191 F.Supp. 347 (D.C. Del.)	30
<i>Shipwrecking, Inc.</i> , 136 NLRB 1518	14
<i>Spayd v. Ringling Rock Lodge</i> , 270 Pa. 67, 113 Atl. 70	16
<i>St. Louis Independent Packing Co. v. N.L.R.B.</i> , 291 F.2d 700 (C.A. 7)	23
<i>Superior Company, Inc.</i> , 94 NLRB 586, <i>enf't denied on evidentiary grounds</i> , 199 F.2d 39 (C.A. 6)	14
<i>Tawas Tube Products, Inc.</i> , 151 NLRB No. 9, 58 LRRM 1330	5, 20
<i>Texas Industries, Inc.</i> , 139 NLRB 365, <i>enf'd</i> , 336 F.2d 128 (C.A. 5)	14
<i>Textile Workers Union (Personal Products Co.)</i> , 108 NLRB 743, <i>enf'd in relevant part</i> , 227 F.2d 409 (C.A.D.C.)	14
<i>The American White Cross Laboratories, Inc.</i> , 66 NLRB 866	24
<i>The Mennen Company</i> , 108 NLRB 348	20
<i>Tri-County Employers Ass'n.</i> , 103 NLRB 653	13
<i>Universal Packaging Corporation</i> , 149 NLRB 262..	15
<i>Wakefield's Deep Sea Trawlers, Inc.</i> , 115 NLRB 1024	20
<i>Wellman-Lord Engineering, Inc.</i> , 148 NLRB 674 ..	11
<i>West Texas Utilities Co.</i> , 22 NLRB 522	13
<i>Winn Dixie Stores, Inc.</i> , 128 NLRB 574	14
<i>Wood, Wire & Metal, etc., Local 238</i> , 156 NLRB No. 93, 61 LRRM 1172	11

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*):

Section 7	6, 8, 11, 13, 17, 22
Section 8(a) (1)	9, 12, 13
Section 8(a) (2)	23, 24

	Page
Section 8(a)(3)	19
Section 8(a)(4)	14, 15, 23
Section 8(b)(1)(A)	5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 21, 26, 32
Section 9(c)(1)	8
Section 9(c)(1)(A)(ii)	7, 18, 22
Section 9(e)	19
Section 9(e)(1)	7, 8, 18, 19, 22
Section 9(e)(2)	19
Section 10(f)	1
<i>Labor-Management Reporting and Disclosure Act of 1959</i> [29 U.S.C., Sec. 411(a)(4)]:	
Section 101(a)(4)	27, 28, 29, 30, 31
Section 103	31
1 <i>Legislative History of the Labor Management Relations Act of 1947</i>	18, 19, 26
2 <i>Legislative History of the Labor Management Relations Act of 1947</i>	12, 16, 18
H. Rep. No. 1082, 82nd Cong., 1st Sess. 3	20
S. Rep. No. 646, 82nd Cong., 1st Sess. 1-2	20
Miscellaneous:	
Aaron, <i>The Labor-Management Reporting and Dis- closure Act of 1959</i> , 73 Harv. L. Rev. 851, 871 (1960)	16, 30
Cox, <i>International Affairs of Labor Unions and the Labor Reform Act of 1959</i> , 58 Mich. L. Rev. 819, 837, 839 (1960)	16, 30

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20653

RICHARD C. PRICE,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the
National Labor Relations Board

BRIEF FOR RICHARD C. PRICE

JURISDICTION

This case is before the Court upon the petition of Richard C. Price, pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), herein called "the Act," for review of a Decision and Order (R. 22-27)¹ of the National Labor Relations Board, herein called "the Board," issued on August 25, 1965.

¹ References to formal documents reproduced as "Volume I, Pleadings" are designated "R."

The Board's Decision and Order are reported at 154 NLRB No. 54. This Court has jurisdiction under Section 10(f) of the Act, the alleged unfair labor practices having occurred in Santa Clara, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Stipulated Facts

The facts ruled upon by the Board were stipulated (R. 14-19; 20; 21), and are as follows:²

For many years Pittsburgh-Des Moines Steel Company, herein called "Pittsburgh-Des Moines," and United Steelworkers of America, AFL-CIO, herein called "the Steelworkers," have been parties to, and have maintained in effect, a series of collective bargaining contracts covering employees at the Santa Clara, California, plant of Pittsburgh-Des Moines (R. 15). One such contract was effective from September 1, 1962, to September 1, 1964, and was entered into by the Steelworkers on behalf of an affiliated local union, Local 4028. The contract contained a union security provision requiring all employees who became members of Local 4028 after September 1, 1962, and all employees hired after that date who completed a 30-day probationary period of employment, to pay, as a condition of their continued employment, union membership dues during the contract's term (R. 15-16).³ A successor agreement between the parties,

² The taking of testimony, and the making of findings of fact and conclusions of law by a Trial Examiner, were waived; the Board's Decision and Order were based upon the stipulated facts (R. 20-23).

³ Local 4028 admitted that, under the union security provision of the 1962-1964 contract between Pittsburgh-Des

operative from September 1, 1964, to September 1, 1967, contained a similar union security provision (R. 16-17).

Richard C. Price, the Petitioner herein, first became an employee of Pittsburgh-Des Moines in 1951. Thereafter, except for a two-year period of military service, Price worked at the Santa Clara plant continuously through the year 1964. Price was subject to the union security provisions in both the 1962 and 1964 contracts; he was a dues-paying member of Local 4028 from 1951 until June 10, 1964 (R. 17).

On April 15, 1964, in Board Case No. 20-UD-60, Price filed with the Regional Director of the Board's Twentieth Region a formal petition to rescind the authority of the Steelworkers to enter into a union security provision covering employees at the Santa Clara plant (R. 3, 16). Price, however, made a mistake in filing this petition. He actually had intended to file a petition to decertify the Steelworkers, that is, to establish by an election that the Steelworkers did not have the requisite support to represent the employees at the Santa Clara plant for collective bargaining purposes. Accordingly, Price sought, and on April 24 was granted, permission to withdraw the deauthorization petition he had filed in Case No. 20-UD-60 (R. 4, 16). Thereafter, on June 3, 1964, in Board Case No. 20-RD-384, Price filed a second petition in which he in fact sought the decertification of the Steelworkers (R. 5, 16).⁴

Moines and the Steelworkers, membership in Local 4028 was a condition precedent to employment at the Santa Clara plant (Answer to Complaint; R. 11).

⁴ On August 14, 1964, an election was held on Price's decertification petition. United Steelworkers of America, Dis-

On May 13, 1964, three employees of Pittsburgh-Des Moines, who were also union members, filed a charge with Local 4028 against Price. The charge alleged that Price had violated the Steelworkers' Constitution by filing the deauthorization petition in Case No. 20-UD-60 (R. 17).⁵ On June 1, 1964, Price appeared before Local 4028's Trial Committee. The Committee found Price guilty as charged, and recommended that penalties be imposed on him. On June 10, 1964, Local 4028's general membership approved and accepted the Trial Committee's findings and recommendations, and thereby imposed on Price the following penalties: (1) suspension from membership in Local 4028 for five years; (2) preclusion from attending Local 4028's meetings for five years; (3) a fine of \$500 plus costs of the hearing before Local 4028's Trial Committee; and (4) indefinite suspension from membership in Local 4028 pending payment of the \$500 fine (R. 17-18).

Price's reaction to the penalties thus imposed was two-fold: he appealed Local 4028's action to the Steelworkers' Executive Board (R. 18); and, on June 11, 1964, he filed with the Board an unfair labor practice charge (R. 6, 14). As a result of Price's unfair labor practice charge, the Board's General Counsel issued

trict 38, AFL-CIO, won the election, and was certified by the Regional Director on August 24, 1964 (R. 7, 16).

⁵ Price was charged with violating Article XII, Section 1(d) of the Steelworkers' Constitution, which provides (R. 17):

Any member may be penalized for committing any one or more of the following offenses: . . . advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members . . .

an unfair labor practice complaint in Case No. 20-CB-1231, alleging that Local 4028 had violated Section 8(b)(1)(A) of the Act. The complaint against Local 4028, which complaint underlies the Board's decision being reviewed in this case, was issued on November 5, 1964 (R. 8-10, 14). Thereafter, on November 23, 1964, the Steelworkers' Executive Board withdrew the \$500 fine, but left in full effect the other penalties imposed on Price (R. 18). Price was privileged to appeal the Executive Board's decision to the regular Steelworkers' Convention; the time to file such an appeal expired, however, without Price exercising the privilege (R. 18-19).

II. The Board's Decision and Order

Rejecting the General Counsel's argument that its decision in *Local 138, Operating Engineers* (Charles S. Skura), 148 NLRB 679, was controlling, and relying instead on its decision in *Tawas Tube Products, Inc.*, 151 NLRB No. 9, 58 LRRM 1330, the Board held that Local 4028 had not violated Section 8(b)(1)(A) of the Act by the action it took against Price because of the petitions he filed with the Board pertaining to Local 4028's representation of Pittsburgh-Des Moines employees (R. 22-27). The Board rested its holding on two premises:⁶ (1) its implicit characterization of Local 4028's action against Price as "union disciplinary action aimed at defending itself [Local 4028] from conduct which seeks to undermine

⁶ The Board set forth its conclusion that "the reasoning in *Tawas Tube* is equally applicable in the instant case" (R. 27); but it did not particularize about the application of *Tawas Tube* to the facts pertaining to the complaint against Local 4028. Consequently, one of the premises underlying the Board's holding appears by implication only.

its very existence" (R. 26); and (2) its explicit statement that the \$500 fine levied against Price was not "an operative factor in this case," because the fine was withdrawn by the Steelworkers' Executive Board (R. 27).⁷ Because of its holding, the Board ordered the dismissal of the complaint against Local 4028 (R. 27).

SPECIFICATION OF ERRORS

1. Although Local 4028 imposed a fine of \$500 and other penalties on Price, one of its members, because Price had filed with the Board petitions seeking the decertification and deauthorization of Local 4028, the Board nevertheless concluded that Local 4028 did not thereby violate Section 8(b)(1)(A) of the Act. The Board's conclusion rests primarily on its view that Local 4028's action was privileged because Local 4028 was defending itself against conduct that sought to undermine its existence. The Board's conclusion cannot be sustained, however, because: (a) Section 8(b)(1)(A) affords protection to union members who invoke the Board's processes; (b) the public interest in protecting the Board's processes is paramount to whatever immunity the Act grants to unions in the regulation of their internal affairs; (c) employees, under Section 7 of the Act, are granted a specific right to refrain from joining or assisting labor organizations, and to refrain from engaging in con-

⁷ Although the Board found that the Steelworkers' Executive Board withdrew the fine against Price and left in force Price's suspension from membership (R. 25, 27), the Board failed to find, or even note, that the Executive Board also left in force Local 4028's verdict that Price be made to pay the costs of the hearing held by its Trial Committee.

certified activities for the purpose of collective bargaining; (d) the right so to refrain is implemented by the right accorded employees, under Sections 9(c) (1) (A) (ii) and 9(e) (1), to petition for union decertification or deauthorization; (e) record facts are lacking to show that Price's petitions jeopardized Local 4028's existence; and (f) the Board's conclusion is inconsistent with other Board holdings to the effect that union members may not be fined for initiating unfair labor practice proceedings which, like the petitions Price filed with the Board, may undermine a union's status as bargaining representative.

2. The Board's conclusion that Local 4028 did not violate Section 8(b) (1) (A) rests in part on its finding that, because the \$500 fine imposed on Price was subsequently withdrawn, the fine did not amount to an operative factor in the case. The Board's finding in this respect is clearly wrong because: (a) a fine imposed on an employee by a union is by nature coercive; (b) the fine levied against Price remained in effect for more than five months, and was withdrawn only after the Board's General Counsel had issued an unfair labor practice complaint against Local 4028; (c) the fact that the fine was withdrawn is not a material consideration, not only because an illegal practice may be resumed, but also because Board orders have a preventive as well as remedial purpose; and (d) the test of intimidation and coercion within the meaning of Section 8(b) (1) (A) is whether misconduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

ARGUMENT

I. The Board Erred in Failing to Find that Section 8(b)(1)(A) of the Act Prohibits Local 4028 from Punishing a Member in Reprisal for the Filing of a Decertification or Deauthorization Petition.

As the Board found, Price, a member of Local 4028, was fined \$500, was assessed the costs of a union hearing, and was suspended from union membership and precluded from attending Local 4028's meetings, because he filed with the Board two petitions: one, seeking to rescind the authority of the Steelworkers to enter into a union security provision affecting employees of Pittsburgh-Des Moines; the other, seeking to decertify the Steelworkers as the bargaining representative of such employees. Out of these facts, there is presented an issue concerning, in essence, the power of a union to punish its members in order to prevent, or delay, their access to the procedures of the National Labor Relations Board.

The Board concluded that Local 4028 was, in the circumstances, privileged to penalize Price. The paramount consideration, according to the Board, was that Local 4028 was defending itself against "conduct" that tended to undermine its status as the bargaining representative of Pittsburgh-Des Moines employees. Below it is shown that the Board's decision subverts both the right guaranteed employees by Section 7 of the Act not to be represented by a union for collective bargaining purposes, as well as the Section 9(c)(1) and 9(e)(1) rights of employees to invoke the processes of the Board to implement their right not to be so represented. It is also shown that the Board's decision in this case is incompatible with a prior Board holding—a holding that has express judicial

support—that a union cannot regulate the access of its members to the Board's processes.

A. Section 8(b) (1) (A) Reaches Union Conduct that Impedes or Delays Union Members from Resort to the Board.

A Board decision, *Local 138, Operating Engineers (Charles S. Skura)*, 148 NLRB 679, sets forth the rationale that controls the disposition of this case. In *Skura*, a union imposed a \$200 fine on one of its members, Skura, for having filed with the Board an unfair labor practice charge in which he had alleged that the union had discriminatorily refused to refer him to available employment. Noting the analogous principle that an employer violates Section 8(a)(1) of the Act if it resorts to restraint and coercion in order to restrict the right of an employee to file an NLRB charge, the Board said that a labor organization likewise infringes employee rights, and thereby violates Section 8(b)(1)(A) of the Act, if it uses restraint or coercion for the same purpose. Accordingly, the Board held that the union's restraint and coercion of Skura was violative of Section 8(b)(1)(A). To the union's contention that Skura had violated union bylaws by filing the NLRB charge without first exhausting internal union remedies, and that, therefore, the proviso to Section 8(b)(1)(A) privileged the fine imposed on him, the Board conceded that, in its view of the law,⁸ the proviso to Sec-

⁸ By according the concept of "internal union affairs" an expansive meaning, and by broadening the scope of permissive union discipline, the Board has markedly narrowed the reach of Section 8(b)(1)(A) of the Act. See *Local 283, UAW, AFL-CIO (Wisconsin Motor Corporation)*, 145 NLRB 1097; *Local 248, UAW, AFL-CIO (Allis-Chalmers Manufac-*

tion 8(b)(1)(A) immunizes a union from Board remedial action with respect to the enforcement of internal union rules by means other than job discrimination; but such immunity, the Board said further, extended only to "a union rule which . . . [does] not run counter to other recognized public policies and, therefore, [is] not beyond the competence of the union to adopt and enforce" (148 NLRB at 682). And the rule embodied in the union's bylaws, concluded the Board, was subordinate to the dominant public interest at stake. The Board thus phrased the matter (148 NLRB at 682) :

By the rule under consideration here, however, Respondent attempted to regulate its members' access to the Board's processes. Considering the overriding public interest involved, it is our opinion that no private organization should be permitted to prevent or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.

turing Company), 149 NLRB 67. The soundness of the Board's construction of Section 8(b)(1)(A) is dubious; the construction was rejected by the Seventh Circuit in *Allis-Chalmers Manufacturing Company v. N.L.R.B.*, 61 LRRM 2498 (March 11, 1966), and it was criticized by this Court in *Associated Home Builders of the Greater East Bay, Inc. v. N.L.R.B.*, 352 F.2d 745.

In view of the controlling significance of the other factors present in this case, particularly the rationale set forth in the Board's decision in the *Skura* case, this brief does not treat with the questionable construction of Section 8(b)(1)(A) embodied in the Board's *Allis-Chalmers* and *Associated Home Builders* decisions.

The rationale of the *Skura* case was expressly approved by the Court of Appeals for the District of Columbia Circuit in *Roberts v. N.L.R.B.*, 350 F.2d 427.⁹ There, one Martin had been fined \$450 and placed on probation by the union of which he was a member because he, too, had filed NLRB charges alleging union discrimination against himself; as in *Skura*, the union involved defended on the ground that Martin had failed to exhaust internal union remedies before resorting to the Board; and the Board found (*Wellman-Lord Engineering, Inc.*, 148 NLRB 674), for the reasons it had expressed in *Skura*, that the union had violated Section 8(b)(1)(A) of the Act. The Court enforced the Board's order. "The right of an employee to file charges," the Court said, "is protected under Section 7." Like the Board in the *Skura* case, the Court rejected the argument that the fine it imposed on Martin amounted only to "an internal union affair," saying (350 F.2d at 429):¹⁰

In other words, by filing a charge with the Board in this case Martin stepped beyond the internal

⁹ In two later cases, the Board expressly reaffirmed its *Skura* holding: *International Union of Operating Engineers, Local 925*, 154 NLRB No. 56, 60 LRRM 1009; *Millwrights & Machinery Erectors, Local Union 1510*, 152 NLRB No. 132, 59 LRRM 1310 (statement that a union member "could be fined if he took his case to the Board"). In *Wood, Wire & Metal, etc., Local 238*, 156 NLRB No. 93, 61 LRRM 1172, the Board extended the *Skura* principle to protect union members who did not occupy an "employee" status.

¹⁰ The Court expressly noted that the language of the proviso to Section 8(b)(1)(A) could not justify the union's action, saying (350 F.2d at 427, n.2): ". . . the imposition of the fine in this case was too remote from a rule with respect to the acquisition or retention of membership to be protected by the mere language of the proviso."

affairs of the Union and into the public domain. The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy. This is not, we agree with the Board, an inroad upon those internal union affairs left by the Act and its policy to be administered solely by the Union.

1. *Controlling authorities and considerations support the doctrines embodied in the Skura and Roberts cases.*

The *Skura* and *Roberts* cases embody two basic doctrines: the first is that Section 8(b)(1)(A) of the Act affords protection to union members who invoke the processes of the Board; the second is that the public interest in protecting the Board's processes is paramount to whatever immunity the Act grants to unions in the regulation of their internal affairs. Each of these doctrines is firmly bottomed, moreover, on controlling authorities and considerations.

As for the scope of Section 8(b)(1)(A), the legislative history leaves no doubt that Congress intended, by enacting the section, to protect against union intimidation the same rights which Section 8(a)(1) protects against employer intimidation. See the remarks of Senators Taft and Ball when the provision was debated in the Senate, 93 *Daily Congressional Record*, 4136-4138, 4142, April 25, 1947; 2 *Legislative History of the Labor Management Relations Act of 1947*, pp. 1018-1021, 1025 (hereinafter cited as "Leg. Hist."). As the Supreme Court said in *ILGWU v. N.L.R.B. and Bernhard-Altmann*, 366 U.S. 731, 738:

In the Taft-Hartley Law, Congress added § 8(b)(1)(A) to the Wagner Act, prohibiting, as

the Court of Appeals held, "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a) (1) . . ." It was the intent of Congress [in enacting Section 8(b)(1)(A)] to impose upon unions the same restrictions which the Wagner Act imposed upon employers with respect to violations of employee rights.

Accordingly, the Board and the courts have uniformly prohibited, under the "restraint and coercion" sections of the Act, all restrictions upon free access to Board processes, whether imposed by employers or unions.

Thus, employers violate Section 8(a)(1) of the Act not only by punishing employees who have invoked Board processes,¹¹ but by encouraging or inducing employees to withdraw Board charges;¹² or by "coaching" employees called upon to testify at Board hearings, instructing them how to answer the questions of a Board field examiner, or procuring false testimony for use at a Board hearing.¹³ Likewise, employers may not discourage or prevent employees

¹¹ *Gibbs Corp.*, 131 NLRB 955, 956, 963, *enf'd*, 308 F.2d 247 (C.A. 5); *Pacific Intermountain Express*, 110 NLRB 96, 108-109, *enf'd*, 228 F.2d 170 (C.A. 8), cert. denied, 351 U.S. 952.

¹² *Clyde Taylor*, 127 NLRB 103, 108; *Clearfield Cheese Co.*, 106 NLRB 417, 418, *enf'd*, 213 F.2d 70 (C.A. 3); *Cambria Clay Products Co.*, 106 NLRB 267, *enf'd*, 215 F.2d 48 (C.A. 6); *Brady Aviation Corp.*, 110 NLRB 25, 27, *enf'd*, 224 F.2d 23 (C.A. 5); *West Texas Utilities Co.*, 22 NLRB 522, 542.

¹³ *Petroleum Carrier Corp. of Tampa, Inc.*, 126 NLRB 1031; *Lloyd A. Fry Roofing Co.*, 123 NLRB 647, 648; *Jackson Tile Mfg. Co.*, 122 NLRB 764, 766, *enf'd*, 272 F.2d 181 (C.A. 5); *Tri-County Employers Ass'n.*, 103 NLRB 653, 673.

from appearing as witnesses at Board inquiries,¹⁴ nor may they interfere with the confidentiality of Board investigations by demanding copies of employee statements to investigators.¹⁵ In parallel course, Section 8(b)(1)(A) has been held to prohibit a union from threatening reprisals against an employee because he intends to give testimony to the Board,¹⁶ or because he filed Board charges,¹⁷ against the union.

Nor is the protection that is thus accorded employees limited to conduct that falls strictly within the language of Section 8(a)(4) of the Act. That section expressly makes it unlawful for an employer to "discriminate against an employee because he has filed charges or given testimony under this Act," but

¹⁴ *Duralite Co., Inc.*, 128 NLRB 648; *Winn Dixie Stores, Inc.*, 128 NLRB 574, 578-579; *Alterman Transport Lines, Inc.*, 127 NLRB 803, 804; *Chatauqua Hardware Corp.*, 103 NLRB 723, 728, *enf'd*, 208 F.2d 750 (C.A. 2); *Superior Company, Inc.*, 94 NLRB 586, 587, *enf't denied on evidentiary grounds*, 199 F.2d 39, 44 (C.A. 6); *Sanco Piece Dye Works*, 38 NLRB 690, 725-726.

¹⁵ *Henry I. Siegel*, 143 NLRB 386; *Hilton Credit Corp.*, 137 NLRB 56; *Texas Industries, Inc.*, 139 NLRB 365, 367-368, *enf'd*, 336 F.2d 128, 132-134 (C.A. 5).

¹⁶ *International Ass'n. of Bridge Workers, Local 84*, 112 NLRB 1059, 1060; *Textile Workers Union (Personal Products Co.)*, 108 NLRB 743, 749, *enf'd in relevant part*, 227 F.2d 409, 411 (C.A.D.C.).

¹⁷ *Shipwrecking, Inc.*, 136 NLRB 1518, 1519, 1529; *Bordas & Co.*, 125 NLRB 1335, 1336, *enf'd*, 288 F.2d 132, 109 U.S. App. D.C. 348; *Local 138, Operating Engineers*, 123 NLRB 1393, 1396, *enf'd in relevant part*, 293 F.2d 187, 193-196 (C.A. 2); *Local 450, Operating Engineers*, 122 NLRB 564, 568, *enf'd*, 281 F.2d 313, 317 (C.A. 5), *cert. denied*, 366 U.S. 909; *Local 294, Int'l. Brotherhood of Teamsters (Valette Trucking Co.)*, 116 NLRB 842, 844.

other forms of conduct which impede resort to the Board likewise have been prohibited. For example, an employer violates the Act by discriminating against a *supervisor* who files charges or gives testimony,¹⁸ or against an employee *erroneously thought* to have filed charges.¹⁹ And employers and unions alike have been found guilty of unfair labor practices where an employee was subjected to blandishments, allurements, rebukes or threats which did not amount to actual discrimination,²⁰ or where there was discrimination against employees whose cooperation with the Board did not include the filing of charges or the giving of testimony.²¹ In the context of this case, it is important to note that the Board has specifically extended the protection of Section 8(a)(4) of the Act to employees who prepared and filed decertification petitions with the Board. *Aristocrat Inns of America, Inc.*, 146 NLRB 1599, 1600; *Precision Fittings, Inc.*, 141 NLRB 1034, 1035, 1043.²²

¹⁸ *Pederson v. N.L.R.B.*, 234 F.2d 417 (C.A. 2); *Better Monkey Grip Co.*, 115 NLRB 1170, *enf'd*, 243 F.2d 863 (C.A. 5), *cert. denied*, 355 U.S. 864.

¹⁹ *Gibbs Corporation*, *supra*, n. 11.

²⁰ See cases cited *supra*, n. 17.

²¹ *Chataqua Hardware*, *supra*, n. 14 (attendance at Board hearing); *Hilton Credit*, *supra*, n. 15 (cooperating with Board investigator).

²² Discrimination for giving testimony at a Board *representation proceeding* is a violation of Section 8(a)(4). See, for example, *Pacemaker Corporation v. N.L.R.B.*, 260 F.2d 880 (C.A. 7); *N.L.R.B. v. Southern Bleachery & Print Works*, 257 F.2d 235 (C.A. 4), *cert. denied*, 359 U.S. 911; *Universal Packaging Corporation*, 149 NLRB 262, 268; *Lindsay Newspapers, Inc.*, 130 NLRB 680, 681, *enforced in this respect*, 315 F.2d 709 (C.A. 5).

With respect to the primacy of the Board's processes, it is true the legislative history underlying Section 8(b)(1)(A) of the Act affords some basis for the proposition that Congress, in enacting the section, did not intend to impose regulations on the legitimate internal affairs of unions.²³ But there is nothing whatever in the legislative history to warrant an impression that the right of resort to the Board is an "internal union matter" over which union autonomy was to be established.

Nor may it be said that a union has any legitimate interest in restricting a member's access to the Board. Thus, the familiar provision of some union constitutions, forbidding members from bringing legal proceedings against the union or its members, has been repeatedly characterized as void and contrary to public policy.²⁴ As the Court of Appeals for the Second Circuit recently stated in *Salzhandler v. Caputo, et al.*, 316 F.2d 445, 450:

[I]t would seem clearly in the interest of proper and honest management of union affairs to permit members to question the manner in which

²³ See, for example, the remarks of Senator Ball on the Senate floor, 93 *Daily Congressional Record* 4400, 4559, April 30 and May 2, 1947; 2 *Leg. Hist.* 1141, 1200.

²⁴ Cox, *Internal Affairs of Labor Unions and the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 837, 839; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 871; *Collins v. I.A.T.S.E.*, 119 N.J. Eq. 230, 182 Atl. 37, 46; *Spayd v. Ringling Rock Lodge*, 270 Pa. 67, 118 Atl. 70, 72-73.

The 1959 Landrum-Griffin amendments, discussed more fully *infra*, at pp. 26-31, crystalized this existing policy and declared it as federal law. Cox, *op. cit. supra*; *Local 636 United Ass'n. v. N.L.R.B.*, 287 F.2d 354, 360 (C.A.D.C.).

union officials handle the union's funds and how they treat the union's members.

That a union may be required to expend additional sums or to suffer annoyances and inconveniences because of a member's decision to invoke legal process, is, therefore, immaterial. See *Clark v. Lindemann & Hoverson Co.*, 88 F.2d 59, 60-61 (C.A. 7).

In sum, there is nothing sacrosanct about the concept of internal union discipline. Certainly, all subjects do not become appropriate for the invocation of union discipline simply because the union has enacted a rule upon those subjects.²⁵ On the other hand, a union member's right of access to the Board's processes should be, and is, absolute; and interference with that right, whether by union rule or otherwise, should be, and is, against public policy. For Board procedures are "not to be controlled at the whim of a private party to the neglect of the public interest," *N.L.R.B. v. Monsanto Chemical Company*, 205 F.2d 763, 765 (C.A. 8).

2. *The Act gives employees the right to petition for union decertification and deauthorization.*

Section 7 of the Act gives to employees the right to join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; it likewise gives them the "right to *refrain from any or all of such activities.*" That there exists "tension" between the employee rights thus protected by Section 7 cannot be denied. See *N.L.R.B. v. Drivers Local Union*

²⁵ See, for example, *I.A.M. v. Street*, 367 U.S. 740 (union may not expend dues collected for support of political causes over member objections).

No. 639, 362 U.S. 274, 279-280. Clearly, however, the "right to refrain" becomes illusory if employees, having once designated a bargaining representative or authorized a union security agreement, are thereafter precluded from withdrawing the authority they have bestowed. The procedures set forth in Sections 9(c)(1)(A)(ii) and 9(e)(1) of the Act not only are tools in effectuating the employee "right to refrain," but, as shown below, they also denote an additional employee statutory right—the right to petition for union decertification or deauthorization.

In the words of Senator Taft, the purpose of a decertification petition, provided for in Section 9(c)(1)(A)(ii) of the Act, is to afford employees an opportunity "to decertify a particular union" or "to decertify a union and go back to a nonunion status, if the men so desire." 93 *Daily Congressional Record* 1013, April 23, 1947, 2 *Leg. Hist.* 1013. And the legislative history pertaining to Section 9(c)(1)(A)(ii) shows that Congress intended to grant employees wishing such "nonunion status" a *right* to petition the Board for the Union's decertification. Thus, the pertinent House Report, H. Rep. No. 245, 80th Cong., 1st Sess. 35, 1 *Leg. Hist.* 326, stated:

Although the terms of the Act would permit them to do so, the Board has denied to employees who have designated an exclusive representative the *right* to have it decertified unless, at the same time, they subject themselves to control by another representative. The bill restores to employees this *right* of which the Board deprived them [Emphasis added.]

See also, S. Rep. No. 105, 80th Cong., 1st Sess. 10, 25, 1 *Leg. Hist.* 416, 431; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 50, 1 *Leg. Hist.* 554. Statements by

legislators show their understanding that the *right* to petition for decertification was given to "discontented" or "dissident" employees. *1 Leg. Hist.* 653 (Congressman Klein); *1 Leg. Hist.* 693-694 (Congressman Powell); *2 Leg. Hist.* 1581 (Senator Murray). This Congressional intent has been effectuated by subsequent Board and court rulings.²⁶

The purpose of a deauthorization petition, under Section 9(e)(1) of the Act,²⁷ is to safeguard employees against subjection to, and possible loss of employment under, a union shop agreement which a majority disapproves. *D. M. Bare Paper Company*, 99 NLRB 1487; *Great Atlantic & Pacific Tea Company*, 100 NLRB 1494, 1497; see S. Rep. No. 105, 80th

²⁶ See, for example, *Retail Clerks International Association v. Montgomery Ward & Co.*, 316 F.2d 754, 757 (C.A. 7); *Kraft Foods Company*, 76 NLRB 492-495 (withdrawal from union membership held not prerequisite to filing a decertification petition); *Harris Foundry & Machine Company*, 76 NLRB 118, 120 (union's noncompliance with the then filing requirements of the Act held not to immunize against decertification proceedings); *Federal Shipbuilding & Drydock Company*, 76 NLRB 413 (employee's reason for filing decertification petition held immaterial); *Morse & Morse, Inc.*, 83 NLRB 383, 384 (union officer held competent to file decertification petition).

²⁷ Between 1947 and 1951, Section 8(a)(3) of the Act provided that a certified union might not seek a union-shop contract unless authorized by employees in a Board conducted election. The Act also provided, in the then Section 9(e)(2), that employees might rescind such authorization by a majority vote in a deauthorization election. In 1951, Sections 8(a)(3) and 9(e) were amended to remove the union-shop authorization election as a condition to a valid union-security contract, but the provision for deauthorization was retained as the present Section 9(e)(1).

Cong., 1st Sess. 26, *1 Leg. Hist.* 432; H. Rep. No. 1082, 82nd Cong., 1st Sess. 3; S. Rep. No. 646, 82nd Cong., 1st Sess. 1-2. Union deauthorization elections, and the filing of petitions therefor, have been recognized by the Board as statutory *rights* granted employees. Thus, in *Hydraulics Unlimited Manufacturing Co.*, 107 NLRB 1646, the Board said:

. . . it has long been established that *employee rights* guaranteed by Section 9(e) of the Act cannot be bargained away by a private agreement in derogation of their statutory *rights*. [Emphasis added.]

Accord: The Mennen Company, 108 NLRB 348, 349; *Wakefield's Deep Sea Trawlers, Inc.*, 115 NLRB 1024, 1025; *Great Atlantic & Pacific Tea Company*, *supra*, at 1499.

3. *The Board's decision is incompatible with the Skura and Roberts cases, and reaches an incongruous result.*

As set forth in the factual statement herein, the Board condoned Local 4028's acts against Price principally on the ground that Local 4028's action was "union disciplinary action aimed at defending itself from conduct which seeks to undermine its very existence." In so doing, the Board treated its holding in the *Skura* case, *supra*, page 9, as "inapplicable," and relied instead on its "reasoning" in *Tawas Tube Products, Inc.*, 151 NLRB No. 9, 58 LRRM 1330.²⁸ The Board thereby committed patent error.

²⁸ The *Tawas Tube* case, unlike the case before the Court, was not an unfair labor practice proceeding; it involved, instead, a Board conducted decertification election. There, while the election was pending, the union expelled the decertification petitioner and another employee who had actively supported the decertification cause. A Board regional director set aside the election, which the union had won, on

Plainly, the Board's decision herein is incompatible with the singularly sound principle the Board itself articulated in *Skura* that "considering the overriding public interest involved . . . no private organization should be permitted to prevent or regulate access to the Board"; it is equally incompatible with the supporting voice of the District of Columbia Circuit in *Roberts*, *supra*, pages 11-12, that the "channels created by Congress for the administration of a public law and policy"—which the Court termed "the public domain"—cannot be allowed to be obstructed by union policy or action. In *Skura* and in *Roberts*, union disciplinary action was aimed at the Board procedural "channel" provided by the unfair labor practice charge. Here, Local 4028's disciplinary action was focused on the Board procedural "channels" provided by decertification and deauthorization peti-

the ground that the union's conduct had inhibited employees from supporting the decertification cause, and had thereby prevented a free choice in the election. The Board, however, reversed the regional director, and upheld the validity of the election. Among the grounds set forth by the Board for its action was the view that "even a narrow reading of the proviso [to Section 8(b)(1)(A)] would necessarily allow a union to expel members who attack the very existence of a union as an institution" (58 LRRM at 1331).

Even if it is limited to the narrow representation issue that was involved, the Board's decision in *Tawas Tube* is questionable, to say the least. In any event, it cannot be a controlling precedent in this case, for *Tawas Tube* is factually distinguishable: (1) it involved a representation issue; (2) the *Tawas Tube* union did not impose a fine on the disciplined employees; and (3) the local in *Tawas Tube* represented no employees other than those involved in the proceeding before the Board (a factor which the Board viewed as relevant to the "existence matter"—58 LRRM at 1331), whereas there is no record showing here that Local 4028's status was so limited.

tions. The distinction, however, is meaningless. In either case, there exists a paramount public interest in protecting the administrative processes of the Board from attack and undermining. Surprisingly, the Board, in this instance, has ignored the admonishment it pronounced in *Skura*, and has, thereby, sanctioned the subversion of its own processes.

Nor is the Board's decision justifiable on the ground that Local 4028's disciplining of Price was a defensive move to preserve Local 4028's "existence." Clearly, there was nothing in the record before the Board to show that if Local 4028's decertification had been actually accomplished, its "existence" would have been placed in jeopardy.²⁹ But even if it were true that Local 4028's decertification would have been tantamount to extinction, that consideration cannot be deemed controlling. The Act is primarily concerned with employee rights and their protection; what rights labor organizations may have under the Act are subordinate to employee rights. Certainly, in the face of the explicit Section 7 employee right to refrain from collective activities, in the face of the explicit Section 9(c)(1)(A)(ii) and Section 9(e)(1) employee rights to decertify and deauthorize unions, the dubious interest of Local 4028 in perpetuating its life—nowhere stated to be a "right" under the Act—ought not to prevail. It is regrettable that the Board has apparently failed to comprehend the Act's basic scheme, and that it has seen fit to subordinate the rights of individual employees to labor union

²⁹ As stated, *supra*, n. 28, there is no record indication that Local 4028's membership was limited to Pittsburgh-Des Moines employees, or that Local 4028 did not represent employees of employers other than Pittsburgh-Des Moines.

domination. The Board's substantial error in this respect merits correction.

Finally, it is apparent that the Board's decision is superficially conceived and reaches an incongruous result. Thus, under Section 8(a)(2) of the Act, it is an unfair labor practice for an employer "to . . . interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."; and the usual Board remedial provision for such a violation is an order directed to the employer to withdraw and withhold recognition from the assisted or supported union unless and until the union acquires a clean status as the result of a Board conducted election. See, for example, *ILGWU v. N.L.R.B. and Bernhard-Altmann*, 366 U.S. 731, 733, 740; *St. Louis Independent Packing Co. v. N.L.R.B.*, 291 F.2d 700, 701, 705 (C.A. 7). Moreover, the assisted or supported union in such a situation is itself guilty of violating Sections 8(b)(1)(A) and 8(b)(2) of the Act. *ILGWU v. N.L.R.B. and Bernhard-Altmann*, *supra*; *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 928 (C.A. 6). Because the Board's *Skura* holding protects a union member against a retaliatory fine for filing an unfair labor practice charge against a union, presumably a union member who instigates an unlawful "assistance case" against a union would be so protected—even though such a case, as shown, could result in the ousting of the union as bargaining representative through a Board remedial order directing the employer to withdraw recognition from the union.³⁰ Yet, in the case

³⁰ See *Meyer & Welch, Incorporated*, 96 NLRB 236, 242-244, 257, where the Board found that an employer violated Section 8(a)(4) of the Act by discriminating against an

before the Court, the decertification petition that Price filed was intended to achieve the identical result—that is, the ousting of the union as bargaining representative—and Price, said the Board, is not entitled to protection against retaliatory action. The Board's decision in this case is therefore logically inconsistent with the Board's *Skura* decision, and no plausible reason is apparent to justify the Board's inconsistency. Certainly, whether a union's loss of bargaining status is brought about through an unfair labor practice case, or through a decertification proceeding, should have no significance.

In short, the Board decision before the Court is not only contrary to controlling precedent and principle, it is also logically defective.

B. *The Board Erred in Finding that the Fine Imposed on Price Had No Operative Effect.*

Noting that the \$500 fine imposed on Price was withdrawn by the Steelworkers' Executive Board, and stating that "Price was therefore never obligated to pay a fine," the Board found that there was no warrant for concluding that the initial levy of the fine "ever became an operative factor in this case" (R.27). Plainly, as a matter of practical discernment, and in view of the legal precedents, the Board's finding in this respect is erroneous.

Thus, the Board's statement of the matter ignores the obvious fact that the fine levied on Price was

employee who had testified in a previous Section 8(a)(2) unfair labor practice hearing which had resulted in a "withdrawal of recognition" order directed against the union favored by the employer. *Accord: The American White Cross Laboratories, Inc.*, 66 NLRB 866, 872, 876-877.

withdrawn only *after* Price had filed with the Board a charge against Local 4028, and only *after* the Board's General Counsel had issued an unfair labor practice complaint against Local 4028. Thus, an inference is warranted that the withdrawal of the fine was not entirely a voluntary action. Similarly, the fine was imposed on Price initially on June 10, 1964 (R. 18); it was not withdrawn until November 23, 1964, or more than five months later (R. 18). To say, then, as the Board has done, that Price was "never obligated to pay a fine," is to misstate the record.

Nor is the Board on firmer ground when the record facts are measured against the controlling authorities. Thus, as the Board said in *Skura* (148 NLRB at 682), "There can be no doubt that a fine is by nature coercive . . ."; and the District of Columbia Circuit said in *Roberts* (350 F.2d at 428), "That a fine such as here imposed is restraint or coercion in the ordinary meaning of those terms is clear." *Accord: Allis-Chalmers Manufacturing Company v. N.L.R.B.*, 61 LRRM 2498, 2501 (C.A. 7).

That the fine imposed on Price was ultimately withdrawn is not a material consideration. The discontinuance of an unlawful labor practice is not decisive, not only because the illegal practice may be resumed, but also because Board orders have a preventive as well as a remedial purpose. *Sewell Manufacturing Co.*, 172 F.2d 459, 461 (C.A. 5); *N.L.R.B. v. Cleveland-Cliffs Iron Co.*, 133 F.2d 295, 300 (C.A. 6); *Flambeau Plastics Corporation*, 151 NLRB No. 70, 58 LRRM 1470, 1472; *Clark Printing Company, Inc.*, 146 NLRB 121, 123. Moreover, as the Third Circuit said in *Local 542, International Union of Op-*

erating Engineers, AFL-CIO, v. N.L.R.B., 328 F.2d 850, 852-853, *cert. denied*, 379 U.S. 826, the test of intimidation and coercion within the meaning of Section 8(b)(1)(A) of the Act "is not whether the conduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Accord: Progressive Mine Workers v. N.L.R.B.*, 187 F.2d 298, 301 (C.A. 7); *Ready Mixed Concrete Company*, 117 NLRB 1266, n. 1; *Local No. 1150, United Electrical, Radio and Machine Workers, etc.*, 84 NLRB 972, 975-976. See also, *N.L.R.B. v. Ford, et al.*, 170 F.2d 735, 738 (C.A. 6). Here, it is clear, the fine Local 4028 imposed on Price tended to coerce or intimidate employees of Pittsburgh-Des Moines, all of whom necessarily were union members.

In sum, contrary to the Board, the fine imposed on Price remained an "operative factor" in the case before the Court.

II. Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 Does Not Privilege the Punishing of Price by Local 4028.

Title I of the Labor-Management Reporting and Disclosure Act of 1959 embodies what Congress called the "Bill of Rights of Members of Labor Organizations." Enacted as an express federal safeguard of union members against the arbitrary exercise of power by their unions,³¹ this Title prohibits unions from, among other things, disciplining mem-

³¹ See H. Rep. No. 741, 86th Cong., 1st Sess. 1-7, *I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, pp. 759-765.

bers without "due process" procedural safeguards, increasing membership dues without prior democratic action, and denying members an opportunity to participate in the consideration of group policies. Section 101(a)(4) of that statute [29 U.S.C., Sec. 411 (a)(4)] may be relevant here, because Local 4028, which intervened in this case, asserted as a defense to the complaint against it that Price had failed to exhaust administrative remedies in the Steelworkers' Constitution before he filed with the Board the petitions that resulted in Local 4028's reprisals against him³² (R. 11-12, 22). Section 101(a)(4) provides:

PROTECTION OF THE RIGHT TO SUE—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * or the right * * * to appear as a witness in any judicial administrative or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings * * *.

Whatever the Steelworkers' Constitutional provisions with respect to the exhaustion of administrative remedies might be, the language of the proviso to Sec-

³² Section 7 of Article XIII of the Steelworkers' Constitution states (R. 19):

It shall be the duty of a member to exhaust all his internal remedies and appeals provided under the Constitution and policies of the International Union and the Local Union By-Laws.

tion 101(a)(4) cannot validly be asserted as a defense to Local 4028's disciplining of Price.

Price's purpose in invoking the Board's processes was, as the record shows, to get rid of Local 4028 as the bargaining representative of the Pittsburgh-Des Moines employees.³³ Plainly, therefore, in view of Price's goal, no possible "administrative remedy" in the Steelworkers' Constitution could accomplish that result for Price; and significantly, no such constitutional provision was cited by Local 4028 in the record herein. In short, Price, as a matter of common sense, could neither be expected, nor required, to exhaust nonexistent union remedies before exercising his statutory *rights* to petition the Board to accomplish a legitimate end—an end which only the Board, and certainly not Local 4028, could provide. See *Calagaz v. Calhoon*, 309 F.2d 248, 259-260.

Moreover, even if it is assumed—contrary to the fact—that there existed some internal union procedures which could have satisfied the purpose for which Price filed his petitions with the Board, any

³³ Arguments pertaining to the failure to exhaust administrative remedies were also made in the *Skura* and *Roberts* cases, *supra*, pp. 9, 11. As set forth, *infra*, such arguments were rejected by the Board and the District of Columbia Circuit. Moreover, the arguments were more plausibly advanced in the *Skura* and *Roberts* cases than is possible here, because there the unions had disciplined members who had invoked the Board's processes to complain of alleged union discrimination involving their job status and job opportunities. In contrast to the relief that Price was seeking from the Board—union decertification—union internal machinery might, conceivably, provide remedies for members who complain that their unions are discriminatorily denying them employment rights.

reliance that Local 4028 might make on the proviso to Section 101(a)(4) would be misplaced. Thus, in the *Skura* case, *supra*, at page 9, the Board passed upon the argument of the union there involved that its coercive conduct was privileged by the Section 101(a)(4) proviso and *Skura*'s failure to exhaust internal union remedies. The Board ruled that Section 101(a)(4) "established a Federal policy consistent with the views of recognized scholars in the field that union rules which would deny access to the courts are contrary to public policy and void." Similarly, in the *Roberts* case, *supra*, at page 11, the District of Columbia Circuit, expressing the view that the proviso to Section 101(a)(4) might require the exercise of "restraint" for a period of time by agency or court when relief was sought by a union member against a union, said further with respect to the section (350 F.2d at 430):

This statute, speaking roughly, parallels rather than meshes into the pre-existing Acts insofar at least as the latter proscribe unfair labor practices of either employers or labor organizations. Thus considered it would seem that Section 101(a)(4) has little bearing one way or the other upon the right of the Board by its traditional methods to preclude coercion upon one seeking its protection, inculding protection against labor organizations after enactment of the Taft-Hartley Amendments in 1947.

The views of the Board, in *Skura*, and the Court, in *Roberts*, with respect to Section 101(a)(4) are sound. The fundamental purpose of this section is to protect union members from retaliation for bringing suit, as its title—"Protection of the Right to Sue"—and its opening phrase—"No labor organization shall

limit the right of any member"—demonstrate. It would be anomalous, therefore, to construe the section to contain a grant of power to unions whereby litigating members might be punished.

Moreover, courts other than the District of Columbia Circuit support the view that the proviso to Section 101(a)(4) simply means that a union member who seeks to institute judicial or administrative remedies "may be required by that court or agency to exhaust internal remedies of less than four months' duration before invoking outside assistance." *Destroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (C.A. 2), cert. denied, 366 U.S. 929 (emphasis by court). See also, *Harris v. ILA, Local 1291*, 321 F.2d 801, 805 (C.A. 3); *Burris v. Int'l Brotherhood of Teamsters*, 224 F.Supp. 277, 280 (W.D. N. Car.); *Baron v. North Jersey Newspaper Guild, Local 173*, 224 F.Supp. 85, 86 (D.C.N.J.); *Deluhery v. Marine Cooks & Stewards*, 211 F.Supp. 529, 535; 199 F.Supp. 270, 273-275 (D.C.S.D. Calif.); *Sheridan v. United Brotherhood of Carpenters, etc., Local 626*, 191 F.Supp. 347, 353, 355 (D.C. Del.).

Commentators agree.³⁴ Thus, Professor Cox explains that there are—

two radically different kinds of limitations upon a union member's freedom to sue the organization.

One limitation is the familiar provision in union constitutions which declares that bringing suit against the union is cause for expulsion unless

³⁴ Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839 (1960); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 869-872 (1960).

the member has exhausted his internal remedies. This restriction is against public policy.

* * * *

A quite different kind of limitation is imposed by the judicial doctrine that a court will not entertain a member's action against a labor organization until he has exhausted all adequate remedies within the organization. The rule is one of judicial administration.

Professor Cox concludes that there is some uncertainty about the nature of Section 101(a)(4)'s impact upon the "rule of judicial administration"; but he finds it "clear" that union-imposed restrictions are outlawed. (Cox, *op. cit. supra*, n. 34).

Finally, there is another reason why Local 4028 may not validly rest its defense upon Section 101(a)(4). Section 103 of the "Bill of Rights" provides: "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal * * *." Hence, at the same time Congress gave aggrieved members a right of action in district courts for infringement of rights specified in the "Bill," it expressly preserved for them all prior remedies;³⁵ and "remedies" provided in the Act administered by the Board must necessarily come within this express legislative judgment.

³⁵ See also, Sec. 603(a), Title VI, preserving "any right or * * * remedy to which members of a labor organization are entitled under * * * other Federal law or law of any State."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's erroneous construction of Section 8(b)(1)(A) of the Act should be rejected by this Court, that the Board's order dismissing the complaint against Local 4028 should be reversed, and that the case should be remanded to the Board for issuance of an appropriate remedial order.

JOHN R. CARROLL
501 Washington Street
Santa Clara, California 95050
Attorney for Richard C. Price

Dated: May 23, 1966

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN R. CARROLL
Attorney for Richard C. Price

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage mem-

bership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * *

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against

an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

* * * *

Sec. 9 (c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

Sec. 9. (e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

* * * *